IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1719 of 2000

Hon'ble MR.JUSTICE Y.B.BHATT

and

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DARAYAS BAMANSHAH MEDHORA

Versus

NARIMAN BAMANSHA MEDHORA

Appearance:

MR MD PANDYA with MR NILESH A PANDYA for Appellant

MR SM SHAH with MR PREMAL R JOSHI for Respondent

CORAM : MR.JUSTICE Y.B.BHATT

and

MR.JUSTICE H.H.MEHTA

Date of decision: 06/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE Y.B.BHATT)

1. This is an appeal under section 96, CPC, at the instance of the appellant who was the plaintiff in Regular Civil Suit No.1395/98, and who was also the defendant in Special Civil Suit No.700/2000.

2. In order to appreciate the contentions raised in the present appeal, it is first necessary to appreciate the factual background. The facts so far they are relevant and pertinent to the decision in the present appeal are not in dispute.

3. The present appellant as the plaintiff filed Regular Civil Suit No.1395/98 before the trial court. It is pertinent to note that in the said suit the appellant-plaintiff had not sought any decree for any declaration whatsoever. The only relief sought in the said suit was for a permanent prohibitory injunction seeking to restrain the defendant of that suit (the present respondent) from disturbing the possession of the appellant-plaintiff in respect of the suit property, and/or from dispossessing the appellant-plaintiff. As against the aforesaid suit, the present respondent as plaintiff had filed Special Civil Suit No.700/2000, firstly for a declaration that he was the owner of the suit property and therefore entitled to retain lawful possession of the suit property, for a further declaration that the appellant-defendant was not a tenant or a licensee in respect of the suit premises, and for a consequential relief by way of a permanent prohibitory injunction restraining the appellant-defendant from disturbing the lawful possession of the respondent-plaintiff.

3.1 It is also pertinent to note that in the suit filed by the appellant, as aforesaid, he had not sought for any declaration in respect of, or as regards, the legality of his possession and/or right to retain legal possession of the suit property. It was only by way of narrating background facts that the appellant-plaintiff had pleaded in the suit plaint that he was a member of the family of the respondent-defendant and was therefore entitled as of right to retain possession of the suit property.

3.2 Looking to the fact that these were two cross-suits between the very same parties, that the subject matter of dispute was the very same property, and that the reliefs sought by each plaintiff in their respective suits were similar, the trial court by consent

of parties consolidated the two suits and directed that they be tried together. Consequently the two suits were consolidated, common issues were raised, common evidence was led, and the two suits were decided by a common judgement. As a result of the said common judgement, the suit filed by the present appellant viz. Regular Civil Suit No.1395/98 was dismissed, whereas the suit filed by the respondent viz. Special Civil Suit No.700/2000 was allowed. It is pertinent to emphasise at this stage that although the judgement was common, it dealt with two separate suits and consequently the common judgement resulted in two separate and distinct decrees.

4. As aforesaid, this is an appeal under section 96, CPC, filed by the appellant, challenging the decree passed in Special Civil Suit No.700/2000, in the suit filed by the respondent (which suit had been decreed mainly in terms of the prayers made in the said suit).

5. In the context of the present appeal arising only from the decree passed in the respondent's suit, the respondent herein raised an objection as to the maintainability of the appeal. In this context the respondent contended that although the two suits were decided by a common judgement, each suit resulted in a separate and independent decree, and that therefore an appeal filed from only one of the decrees would be incompetent.

5.1 It is on this central controversy that the present appeal requires to be considered.

6. In the first instance, learned counsel for the appellant sought to contend that although the present appeal is filed and presented as a singular appeal, it can and should be considered as an appeal from the common judgement, although resulting in two decrees. In support of this contention, certain facts were sought to be highlighted. Learned counsel for the appellant referred to para 9 of the Memorandum of Appeal (amongst others) to emphasise that the said memorandum of appeal encompasses a composite challenge to the common judgement which has ultimately resulted into two decrees. It was contended that since the memo of the appeal challenges the common judgement in respect of two separate and distinct suits, this appeal also could be regarded to be an appeal from the judgement in both the suits. It was also urged in support of this contention that the valuation of the appeal is also the sum total of the composite valuation of the two suits, and the court fees paid on the memorandum of appeal is also the sum total which would be

due if separate appeals were filed from separate decrees. It was urged that the present appeal should be regarded to be a common appeal from the two decrees, particularly since one appeal, in law, can lie from two decrees.

7. Apart from the question as to whether one appeal can lie from two decrees or not, which question being the centre of the controversy will be considered hereinafter, certain factual aspects in the context of this submission require to be noted and dealt with. The fact that the memo of appeal contains grounds arising from the common judgement and findings from the common issues in the two suits is irrelevant. Whether the appellant has paid court fees on a composite valuation, as if they were two appeals, and/or on a composite valuation of the two suits, is again irrelevant. The fact remains that ground (vv) as contained in the memo of appeal refers to only one decree as being the subject matter of challenge. Similarly, the decree which forms the basis of challenge in the appeal is only one, as can be seen from the decree which is annexed to the memo of appeal. This decree is at Exh.146 in Special Civil Suit No.700/2000. No other decree is annexed to the memo of appeal. Therefore, no matter what grounds may be urged in support of the appeal, whether it is treated as an appeal from one decree or an appeal from both the decrees, the fact remains that this appeal cannot be treated factually to be an appeal challenging both the decrees. This is irrespective of the question of law as to whether one appeal could lie and/or be maintainable when the appeal challenges only one of the decrees arising from the common judgement.

8. Learned counsel for the appellant has sought to place reliance upon numerous decisions, including decisions of various High Courts, in support of his contention. These decisions include the following:

1. AIR 1927 Lahore 289, in the case of Mt. Lachhmi Vs. Mt. Bhulli.

2. AIR (30) 1943 Madras 139, in the case of Pappammal Vs Meenammal.

3. AIR 1969 Allahabad 504, in the case of Jai Narain Vs. Bulaqi Das.

4. 4 GLR 282, in the case of Haji Gulamnabi Vs. Abasbhai.

5. AIR (34) 1947 Nagpur 248, in the case of Manohar Vinayak Vs. Laxman Anandrao.

6. AIR 1954 Travancore-Cochin 235, in the case of Subramonian Vs. Nagarama.

7. ILR 29 Madras 333, in the case of Panchanada Velan Vs. Vaithinatha Sastrial.

9. In our opinion, it is not necessary to examine seriatim each of these decisions inasmuch as they have been considered, evaluated, discussed, noted, distinguished, approved or dissented from, by several subsequent decisions of the Supreme Court which we shall discuss hereinafter.

10. However, we may note only in brief the distinction, and the departure from the earlier point of view, created by subsequent decisions of the Supreme Court, from the aforesaid decisions. The controversy considered by the aforesaid decisions has been examined mainly on whether the principles of res judicata as enshrined in section 11 of CPC would be applicable in such cases. It appears to us that the line of reasoning first enunciated by the Full Bench in the case of Mt. Lachhmi (AIR 1927 Lahore 289) and adopted by different High Courts in India subsequently, appear to flow from a generalised principle laid down by the Full Bench to the effect that the principle of res judicata which created a bar to subsequent agitation of the same issue, is created by the judgement and not by the decree.

10.1 In our opinion, it would be a loose generalisation to hold that the bar of res judicata is created only by the judgement and not by the decree. This generalisation would hold the field only if the question under consideration was in respect of only, or merely, "issue estoppel", and not in respect of a common judgement resulting in two decrees.

10.2 In this context we cannot overlook the fact that an appeal under section 96, CPC lies only from a decree and not from a judgement. It cannot be overlooked that these are not merely loose concepts, but have a very specific meaning and connotation inasmuch as each of these has been independantly defined under the CPC.

10.3 Section 2(9) defines a "judgement" as the statement given by the Judge on the grounds of a decree or order. As against this, a "decree" is defined by

section 2(2) of CPC as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It is not necessary, in our opinion, to refer to numerous authorities on the distinction between these two phrases and concepts, as used in law. The short substance of the distinction is that the judgement constitutes the opinion of the Court, wherein it encompasses the pleadings of the parties, the issues, the evidence led by the respective parties, the interplay of different pieces of evidence upon each other, the conclusions drawn and the findings of fact recorded by the Court. In short, the judgement reflects merely the justification of the court for passing the decree in question. On the other hand, the decree is the crystallisation of the rights in controversy between the parties, as declared by the court, on the basis of the judgement. Consequently, in our opinion, a judgement and a decree are not phrases or concepts which can be used in the alternative to each other, neither do the two concepts overlap each other. In our opinion, it is precisely for this reason that section 96 of CPC contemplates an appeal only from a decree, and by necessary implication, not from a judgement. Furthermore, when the rights of a party crystallised in a decree are sought to be enforced by due process of law, by execution proceedings under Order 21, CPC, such proceeding would lie only on the basis of a decree, and not on the basis of a judgement.

10.4 The entire controversy in law as to whether a single appeal would lie from one of the decrees arising from a common judgement has been considered in the various decisions aforesaid, only by testing against and applying the principle of res judicata. In the context of these decisions it is necessary to bear in mind that a reference to the common judgement, and consequently a reference to a supposed judgement resulting in one of the decrees, is only necessary to ascertain whether "the question substantially in issue" was common in both the suits.

11. While considering the aforesaid decisions, which, as aforesaid, have also been considered by the subsequent decisions of the Supreme Court, it also requires to be kept in mind that the principle of res judicata is not the only principle upon which this legal controversy can be reflected upon. Another principle which, in our opinion, would have a bearing on this controversy is the

principle of acquiescence and/or estoppel. This principle would also apply to the controversy in issue, inasmuch as it could be urged that when only one decree is challenged in the singular appeal, the other decree which is not the subject matter in appeal, is a decree which is acquiesced to. Ultimately it makes no difference whether the same set of reasons and the same set of findings justify both the decrees. This may perhaps appear to be similar to calling a glass half full or also calling it half empty. It may be that such a description carries different concepts, although the factual result is the same. The distinction in law lies in the real and substantive distinction between an appeal from a judgement and an appeal from a decree. Once this distinction is established and kept in mind, it becomes a simpler exercise to appreciate the view expressed by the Supreme Court in the decisions hereinafter discussed.

12. In the case of Sheodan Singh Vs. Daryao Kunwar, reported in AIR 1966 SC 1332, the Supreme Court specifically found that where there were two suits having common issues, and the suits were decided by the trial court on merits which resulted in two appeals therefrom, and one of the appeals was dismissed (although not on merits), the decision of the appeal court will be res judicata. It is pertinent to note that in the said decision, the Full Bench decision in the case of Mt. Lachhmi (supra) has been specifically considered, as also the supreme Court decision in the case of Narhari Vs. Shanker, reported in AIR 1953 SC 419.

12.1 The aforesaid decision of the Supreme Court viz. Sheodan Singh, has been referred to, considered and relied upon by the Supreme Court in its subsequent decision in the case of Premier Tyres Limited V. The Kerala State Road Transport Corporation, reported in AIR 1993 SC 1201. This decision also takes into consideration the earlier decision of the Supreme Court in the case of Ramagya Prasad Vs. Murli Prasad, reported in AIR 1974 SC 1320, and distinguishes the earlier decision of the Supreme Court in the case of Narhari Vs. Shanker, reported in AIR 1953 SC 419.

12.2 In the said decision (viz. Premier Tyres Ltd. (supra) there were two suits which were connected and tried together inasmuch as the nature of the dispute in both the suits were same. The issues framed were also common. In this case, the appellant did not file any appeal against the dismissal of the suit for part of its claim, but an appeal was filed against the decree granted in favour of the respondent in the appeal in the suit

filed by it. The High Court of Kerala in its decision dismissed the appeal of the appellant as barred by res judicata since the finding recorded in the connected suit had become final inasmuch as the same was not challenged in the appeal. In the appeal before the Supreme Court it was urged, as is urged in the appeal before us, that both the suits were connected and decided by common order, and therefore the issues in neither suit can be said to have been decided in a former suit, and consequently the basic ingredient of section 11 of CPC would not be satisfied. This submission was sought to be supported by the earlier decision of the Supreme Court in the case of Narhari Vs. Shanker (supra). However, the Supreme Court observed that the decision in the case of Narhari Vs. Shanker (supra) has been distinguished in the case of Sheodan Singh (supra), inasmuch as it related to only one suit and therefore the observations extracted therefrom were not relevant in a case where more than one suit was decided by a common order. The Supreme Court then observed that in the present case before it, there were different suits from which different appeals had to be filed. (emphasis supplied). In paragraph 4 of the said decision the Supreme Court therefore concluded that where an appeal arising out of connected suits is dismissed on merits, the other cannot be heard and has to be dismissed.

12.3 The question which was also considered by the Supreme Court was as to what happens where no appeal is filed, as in the case before the Supreme Court from the decree in the connected suit. The Supreme Court specifically found that the effect of non-filing of an appeal against a judgement or decree is that it becomes final. This finality can be taken away only in accordance with law. The same consequences follow when a judgement or decree in a connected suit is not appealed from. These observations of the Supreme Court, which were further fortified by the findings recorded by it in para 6 of the said decision, are as under:

> "Thus, the finality of finding recorded in the connected suit, due to non filing appeal, precluded the Court from proceeding with appeal in other suit."

12.4 In the context of the observations made by the Supreme Court in the said decision, and particularly the observations in paras 4 and 6 of the said decision, we are also of the view that the Supreme Court has, to some extent, departed from the earlier principles of relying and referring to only the principles of res judicata, by

also considering and incorporating the principles of acquiescence and issue estoppel. As discussed hereinabove, the principle of acquiescence and issue estoppel are also relevant and can be applied to the consideration of examining the legality and validity of the contentions raised for and against the maintainability of such an appeal.

13. The decision of the Supreme Court in the case of Ram Prakash Vs. Charan Kaur, reported in AIR 1997 SC 3760 is also relevant and pertinent.

13.1 This decision is based on facts which are identical to the facts before us. The Supreme Court specifically held that where the findings in one suit had been allowed to become final in the absence of an appeal, an appeal filed against the findings in another suit would be barred by principles of res judicata.

13.2 In para 2 of the said decision the Supreme Court observed as under:

> "2. It would be obvious that since the claims of the petitioner and the respondents have arisen from the same cause of action and the finding of the appellate Court that damages had accrued to the respondents due to misfeasance or malfeasance having been allowed to become final, the decree which is subject matter of the special leave petition cannot be assailed. The self-same question was directly in issue and was the subject matter of both the suits. The same having been allowed to become final, it cannot be gone into since the same had attained finality, the petitioner having not filed any appeal against the appeal dismissing the suit. In view of this situation, the High Court was right in concluding that the decree of dismissal of the suit against the petitioner would operate as res judicata under section 11, CPC in the appeal against which the petitioner has filed the second appeal."

13.3 We may also observe in passing that in the present decision the Supreme Court has applied not only the principles of res judicata, but has also decided the facts from the alternate perspective, by applying the principles of acquiescence and issue estoppel.

14. The decision of the Supreme Court in the case of Badri Narayan Vs. Kamdeo Prasad (supra) was also sought

to be relied upon, which sought to be distinguished from the decision in the case of Narhari Vs. Shankar (supra). However, the latter has indirectly been approved by the Supreme Court. In any case, this decision i.e. Badri Narayan has been referred to and relied upon by the Supreme Court in the case of Premier Tyres Limited (supra) and therefore the same does not require any lengthy or independent discussion.

15. The same reasoning applies to the decision of the Supreme Court in the case of Ramagya Prasad Vs. Murli Prasad (AIR 1974 SC 1320), which has been considered and discussed in the case of Premier Tyres Limited (supra).

16. A reference was also made to the decision of the Supreme Court in the case of Managing Director Vs. K. Ramachandra Naidu, reported in AIR 1995 SC 316. In our opinion, this decision would not have any application to the facts inasmuch as the question before the Supreme Court was on the facts where both the parties had filed separate appeals from a common judgement in a writ petition, on which facts it was found that the dismissal of the appeal filed by one party on the ground of limitation, would not adversely affect the appeal filed by the other party which was within limitation. Obviously the case before the Supreme Court was on consideration of two appeals filed by two separate parties arising from the same judgement. Here the case is entirely different, where the appellant, though adversely affected by both the decrees, has chosen to challenge only one of them.

17. Reliance was also placed upon a decision of the Madras High Court in the case of Panchanada Velan Vs. Vaithinatha Sastrial, reported in ILR 29 Madras 333. In our opinion, this decision does not require any detailed discussion inasmuch as the same has been referred to and discussed in the earlier decision of the Supreme Court in the case of Sheodan Singh (supra).

18. In the premises aforesaid, we are of the opinion that the present appeal is not maintainable and is consequently dismissed with no order as to costs.

19. At this stage learned counsel for the appellant makes an oral request, invoking Article 133 of the Constitution of India, requesting a certificate under Article 134A of the Constitution, on the submission that the present case involves a substantial question of law of general importance. On the facts of the case and in view of the clear law laid down by the Supreme Court as

discussed hereinabove, we are of the opinion that such a certificate is not justified. This request is, therefore, rejected.

20. In view of the fact that learned counsel for the appellant states that the appellant desires to prefer a Special Leave Petition before the Supreme Court, on his request the ad interim relief granted earlier is extended upto 8th January 2002.

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